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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL DELGADO,

Defendant and Appellant.

B239630

(Los Angeles County
Super. Ct. No. BA360743)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Curtis B. Rappe, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Paul M.
Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff
and Respondent.

Defendant Gabriel Delgado appeals from the judgment following his conviction by jury of first degree murder (Pen. Code, § 187, subd. (a))¹ with true findings that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), that he personally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subd. (d)), and that a principal discharged a firearm with the same result (§ 12022.53, subds. (d) & (e)(1)). He was sentenced to state prison for 50 years to life. On appeal, he contends that there was insufficient evidence to support the gang enhancement, in particular, that the evidence failed to prove that one of the “primary activities” of his gang, the Maywood Locos, included the commission of one or more qualifying offenses listed in section 186.22, subdivision (e). We disagree, and affirm.

BACKGROUND

Around 3:00 p.m. on August 13, 2009, defendant shot and killed Luis Mora across the street from a Shell gas station located at Atlantic Boulevard and 57th Street in Maywood. Because the sole issue on appeal is the sufficiency of the evidence to support the gang enhancement, we only briefly summarize the circumstances of the murder.

The Shell station was on the east side of Atlantic Boulevard, in the territory of defendant’s gang, the Maywood Locos. Across the street where the murder occurred, on the west side of Atlantic Boulevard, was the territory claimed by a rival gang, the Krazy Wicked Sureños (K.W.S.). Defendant arrived at the gas station as a passenger in a Honda automobile driven by Yesenia Villarreal, who

¹ All undesignated section references are to the Penal Code.

associated with the Maywood Locos.² Like defendant, the other passengers in the car -- Angel Garcia, Angel Hidalgo, and Yvette Lemus – were members of the Maywood Locos.³

While Villarreal was pumping gas, Garcia looked across the street and told defendant, “It’s a dummy,” or “That fool’s a dummy.” According to Los Angeles County Deputy Sheriff Andrew Serrata, the prosecution gang expert, the Maywood Locos use the term “dummy” to refer to rival gang members such as members of K.W.S. Defendant said to Hidalgo, “You got it?” Hidalgo told Villarreal to pick them up across the street, and he and defendant headed across Atlantic Boulevard jaywalking. A security camera at the Shell gas station captured the activity at the Shell station, including defendant and Hidalgo leaving to cross the street.

Luis Mora, who lived in the area west of Atlantic Boulevard, was walking home after purchasing shaved ice from a street vendor. According to eyewitnesses Fernando Tovar and Robert Rodriguez, defendant and Hidalgo came up behind Mora. Defendant drew a revolver and fired approximately three shots at him, and he fell to the ground. Having heard the gunshots while still at the Shell gas station, Villarreal drove with Lemus and Garcia across the street to where Hidalgo had directed her, and picked up defendant and Hidalgo. Defendant said, “I got him. He was screaming.”

Mora died from multiple gunshot wounds. He was not a gang member.

² Originally charged with murder, Villarreal pled guilty to voluntary manslaughter in exchange for a sentence of four years in prison. As part of the plea bargain, she testified at trial.

³ Defendant was jointly charged and tried with Hidalgo and Garcia. The jury deadlocked as to Garcia and convicted Hidalgo of murder. Hidalgo is not a party to this appeal. Lemus, who was not charged, was not available at trial, and her preliminary hearing testimony was read to the jury.

Asked a hypothetical question based on the circumstances of defendant's shooting of Mora, Deputy Serrata testified that in his opinion, the crime was committed to benefit the Maywood Locos, in that shooting someone suspected of being a rival gang member in that gang's territory in broad daylight would tend to instill fear in the rival gang and in the neighborhood, and would garner respect for the shooter within his own gang. As necessary, we summarize additional testimony by Deputy Serrata in our Discussion.

DISCUSSION

To prove the truth of an enhancement under section 186.22, subdivision (b)(1)(C), the prosecution must prove, inter alia, that the particular criminal street gang at issue has as one of its "primary activities" the commission of one or more specified crimes listed in section 186.22, subdivision (e).⁴ Here, defendant contends that the evidence was insufficient to prove this element, because the prosecution gang expert, Deputy Serrata, failed to adequately testify that Maywood Locos members consistently and repeatedly commit one or more qualifying crimes, and failed to explain the basis of his knowledge concerning the crimes committed by the gang. We are not persuaded.

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's

⁴ Defendant does not dispute the sufficiency of the evidence to prove the other two elements of the gang enhancement: that the Maywood Locos was an ongoing association of three or more persons sharing a common name, identifying sign, or symbol, and that the group's members have engaged in a pattern of criminal gang activity as statutorily defined. (§ 186.22, subd. (f).)

members.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* [(1996) 14 Cal.4th 605, 607]. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on ‘his personal investigations of hundreds of crimes committed by gang members,’ together with information from colleagues in his own police department and other law enforcement agencies.” (*Sengpadychith, supra*, 26 Cal.4th at p. 324.)

In the instant case, Deputy Serrata testified that he was familiar with the Maywood Locos gang and its territory from working in the past as an officer for the Maywood Police Department and working currently as a Deputy Sheriff in the East Los Angeles Operation Safe Streets gang unit. He started investigating gangs in 2005, had interviewed hundreds of gang members, and had been involved in hundreds of investigations of gang members. He had had contact with Maywood gang members “several times,” including “numerous contacts” with defendant, who was with other Maywood gang members “several times” in those encounters. He had also had “several contacts” with Hidalgo, and had seen once seen Garcia in the company of other Maywood Locos.

Asked by the prosecutor if he was “familiar with the types of crimes that Maywood Locos gang members participate in,” Deputy Serrata answered that he was. When the prosecutor asked him to “describe what those are based on [his]

experience,” Deputy Serrata testified: “Auto theft, burglary, robbery, assault, assault with deadly weapons, attempted murder[,] . . . murder, [extortion], and narcotics sales” of “mostly marijuana and methamphetamine.” These crimes, with the exception of mere assault, are qualifying crimes listed in the following subparagraphs of section 186.22, subdivision (e): auto theft ((e)(9)), burglary ((e)(11)), robbery ((e)(2)), assault with a deadly weapon ((e)(1)), attempted murder ((e)(3)), murder (e)(3)), extortion ((e)(19)), and narcotics sales ((e)(4)).

Besides testifying to his knowledge of the commission of these crimes based on his experience, Deputy Serrata also testified that he had investigated many of these crimes committed by Maywood Locos, and knew it was common for gang members to commit crimes together, as in the instant case. In one case with which Deputy Serrata was personally familiar, Maywood Locos member Steven Alan Espinosa was charged with murder and attempted murder.⁵

Further context for Deputy Serrata’s testimony about the primary activities of the Maywood Locos was provided by his explanation of the significance of a gang protecting its territory and of gang members putting in work for the gang. He explained that a gang makes money by controlling narcotics sales in its territory. Also, gang members such as members of the Maywood Locos and K.W.S. strictly enforce territorial boundaries, and it is important for gang members to know those boundaries, “[b]ecause they could end up being the victim of a crime, whether it

⁵ Deputy Serrata was questioned about another case in which Maywood Locos member Elias Jimenez was charged with selling methamphetamine and marijuana. Defendant notes that the “primary activities” element of the gang enhancement refers to past or “present” crimes – “present” meaning crimes that occurred as of the time of the charged crime. (See *Sengpadychith*, *supra*, 26 Cal.4th at pp. 323; *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.) In the instant case, although the record is not entirely clear, it appears that the narcotics offense to which Deputy Serrata referred occurred after the murder in the instant case. We therefore do not consider his testimony about that case.

[be] assault[], attempted murder or murder. . . . It's pretty common place in that area." The rivalry between the Maywood Locos and K.W.S. was long-standing, having begun in the late 1980's to early 1990's, and at the time of the instant killing "there were so many shootings back and forth that gang members were even afraid to walk around in their own area."

Deputy Serrata explained that putting in work for the gang was an important part of gang life and involves committing "violent crimes against the other gangs. It could be assaults, assaults with deadly weapons, attempted murder, murder." Indeed, shooting at rival gang members is a "common aspect of putting in work."

Finally, in determining whether the "primary activities" element has been proven, the jury was entitled to consider the circumstances of the present case. (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) Here, the unprovoked nature of the killing tended to support the conclusion, apparent from Deputy Serrata's testimony, that shooting at and/or killing rival gang members was a consistent and regular activity of the Maywood Locos.

Viewing the evidence in the light most favorable to the judgment, and drawing all inferences in support (*People v. Albillar* (2010) 51 Cal.4th 47, 59), we conclude that this evidence was sufficient to prove that one of the primary activities of the Maywood Locos was committing one or more of the statutorily enumerated offenses.

First, contrary to defendant's contention, the basis of Deputy Serrata's knowledge of crimes committed by the Maywood Locos was adequately established. He was familiar with the gang and its territory from his work with the Maywood Police Department and as a Deputy Sheriff. He testified that he was familiar with the crimes in which Maywood gang members participate based on his "experience," that he had investigated many of those crimes and, in particular, that

he had personal knowledge of one prosecution of a Maywood Locos member for murder and attempted murder. He further testified that he had had contact with Maywood gang members “several times,” including “numerous contacts” with defendant, who was with other Maywood gang members “several times” in those encounters, and that he had had “several contacts” with Hidalgo, as well as one with Garcia when he was in the company of other Maywood Locos. It could thus be reasonably inferred that Deputy Serrata based his testimony concerning crimes committed by the Maywood Locos on his experience as a law enforcement officer in the gang’s territory, his personal involvement in investigating many crimes committed by the gang, and his numerous contacts with Maywood gang members. (See *People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122 [summarizing current California law: “a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies”].) This was an adequate foundation for his testimony.

Second, it is true that Deputy Serrata never specifically used the term “primary activities,” and that he did not specifically describe the Maywood Locos’ commission of qualifying crimes as “consistent” and “repeated.” Nonetheless, based on the context of Deputy Serrata’s entire testimony, the jury could reasonably infer that Maywood Locos’ members “consistently and repeatedly,” rather than “occasion[ally]” (*Sengpadychith, supra*, 26 Cal.4th at pp. 323-324), committed various offenses listed in section 186.22, subdivision (e), such as assault with a deadly weapon, attempted murder, and murder. Deputy Serrata testified that the gang’s members “participated” in such crimes, that gangs like the Maywood Locos enforce territorial boundaries by committing such crimes, that putting in work by shooting at rival gang members is “common,” that at the time of

the instant crime there had been so many shootings between the Maywood Locos and K.W.S. that members of the gangs were wary of being outside in their own territory, and that it was “common” for gang members to commit crimes together as in the present case. Indeed, the circumstances of the instant case supported the inference that committing violent crimes against rival gang members was a regular and consistent activity of the Maywood Locos. In the midst of the everyday activity of accompanying other gang members to buy gas at a gas station within Maywood Locos territory, defendant, with no hesitation, took advantage of the coincidental presence of a suspected K.W.S. member across the street, hunted him down, shot him from behind, and then bragged, “I got him. He was screaming.” The brazen, almost nonchalant manner in which the crime was committed supported the inference that shooting a rival gang member was all in a day’s work for a member of Maywood Locos.

In addition, Deputy Serrata testified that gangs control the sales of narcotics in their territory, thus suggesting Maywood Locos’ gang members’ participation in narcotics sales, mostly of marijuana and methamphetamine, was one of the “‘chief’ or ‘principal’ occupations” of the gang. (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) This evidence, too, supported the finding that members of the Maywood Locos committed one or more statutorily listed offenses not merely occasionally, but consistently and repeatedly.

Defendant relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 to contend that the evidence was insufficient. However, that decision is distinguishable. There, the gang expert’s sole testimony about the gang’s primary activities was: “‘I know they’ve committed quite a few assaults with a deadly weapon, several assaults. I know they’ve been involved in murders. [¶] I know they’ve been involved with auto thefts, auto/vehicle burglaries, felony graffiti,

narcotic violations.”” (*Id.* at p. 611.) There was no testimony elicited concerning the basis of the expert’s knowledge or the frequency with which the crimes were committed. The court of appeal concluded that absent additional information about how the expert had come to “know” this information, the testimony was insufficient to meet the primary activities element. (*Id.* at p. 612.)

By contrast, Deputy Serrata’s testimony established that he based his testimony on sources on which he was entitled to rely: his experience as a law enforcement officer in the Maywood Locos territory, his personal involvement in investigating many of the gang’s crimes, and his contacts with the gang’s members. Further, although Deputy Serrata did not expressly testify that commission of offenses listed in section 186.22, subdivision (e), constituted one of the primary activities of the Maywood Locos, that conclusion could fairly be inferred from the totality of his testimony.

DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.